

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

IN THE MATTER of the Amendment  
Of ARM 38.5.1902 Pertaining to  
Qualifying Facilities

) REGULATORY DIVISION  
)  
) MAR Notice No. 38-5-214

**Comments of Sagebrush Energy, LLC**  
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The Montana Public Service Commission (MPSC) should not adopt the proposed rule to lower the eligibility cap for published rates to 2 MW and require QFs over that size to proceed through a bidding process to exercise their right to sell pursuant to a PURPA contract. *See In re amendment of ARM 38.5.1902 pertaining to qualifying facilities*, Notice of Public Hearing and Proposed Amendment, MAR Notice No. 38-5-214 (Oct. 17, 2011). The proposed new ARM 38.5.1902 would require all QFs over 2 MW in size to participate in competitive solicitation as the only avenue to obtain a contract. If the QF is unsuccessful in the solicitation (because it lacks the resources to compete effectively or for any other reason), the QF may only sell its energy and capacity “according to the terms of a newly negotiated short-term written contract or in accordance with the newly computed short term standard tariffed avoided cost rates.” Thus, the only opportunity for a long term contract for all QFs over 2 MW would be through the bidding process.

As demonstrated by the *JD Wind I* and *Cedar Creek Wind LLC*, QFs do not generally fare well when utilities have the discretion or the ability to stall or delay negotiations to the Sagebrush Comments, MAR Notice No. 38-5-214

detriment of the QF. See *JD Wind I, LLC*, 129 FERC ¶ 61,148, ¶¶25-26, 29 (2009) (discussing QF's right to contract with capacity payments); *JD Wind I, LLC*, 130 FERC ¶ 61,127, ¶¶ 23-24 (2010), *denying re'ing* (same) and *Cedar Creek Wind LLC*, 137 FERC ¶ 61,006 (Oct. 4, 2011). Thus, lowering the eligibility cap for published rates will surely make QF projects much less viable in Montana by requiring virtually all QFs to negotiate the critical rate component of the purchase agreement. PURPA requires FERC and the states to "encourage" QF generation, *see FERC v. Mississippi*, 465 U.S. 742, 751 (1982), and the MPSC would be failing to do so by lowering the eligibility cap.

Further, to lower the cap and require virtually all QFs to proceed through a bidding process as their only avenue to obtain a contract with NWE would violate PURPA. PURPA requires utilities to purchase all energy and capacity made available by a QF at the utility's full avoided costs. 16 U.S.C. §824a-3(b), (d); 18 C.F.R. § 292.303(a), (b). While the MPSC has the discretion to lower the eligibility cap for published rates to 2 MW, any QF using a renewable fuel source up to 80 MW in size is a "small power production facility" entitled to a contract at the utility's full avoided cost under FERC's rules. 16 U.S.C. § 796(17)(A); 18 C.F.R. § 292.204; *American Paper Institute*, 461 U.S. at 417-18. Thus, a bidding process is problematic because PURPA requires the states to provide QFs with an avenue to obligate themselves to sell energy and capacity at estimated full avoided costs pursuant to a legally enforceable obligation with avoided cost rates calculated on the date the QF obligates itself – not the date the utility chooses to hold a solicitation seeking resources similar to the QF. *See Cedar Creek Wind LLC*, 137 FERC ¶ 61,006, ¶ 36. QFs wishing to sell between bidding solicitations, and QFs unsuccessful in the bidding solicitation would be left with no avenue to sell their output under a long term contract at any price, and such a procedure would therefore violate PURPA. The MPSC should

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not allow NWE to use a bidding process as a stumbling block to QFs seeking to sell at the full avoided costs of energy and capacity.

The experience in other states can be instructive. In Oregon, PacifiCorp once suggested that all cogeneration QFs over the 100 MW size limit triggering that state's competitive bidding guidelines should be required to use the bidding process to obtain a contract. *See In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Public Util. Comm'n of Oregon, Docket No. UM 1129, Order No. 07-360, p. 37 (Aug. 20, 2007). The Oregon Commission stated:

We do not adopt PacifiCorp's proposal to require QFs 100 MW or larger to participate in the utility's RFP [bidding] process and provide a capacity payment only if the QF is a winning bidder. We find the proposal inconsistent with federal PURPA law, which requires the utility to purchase any energy and capacity that is made available from a QF.

*Id.*

FERC itself once commenced a docket to provide "non-mandatory bidding procedures to determine avoided cost as an alternative to using an administratively determined avoided cost." *Order Terminating Proceedings, Regulations Governing Bidding Programs*, 64 FERC ¶ 61,364 (Sept. 29, 1993). But FERC terminated that rulemaking without altering its QF regulations. *Id.* That FERC did not adopt the process and that FERC's process would have been "non-mandatory" only further highlights that a bidding process should not be the only option for QFs of any size.

There are many ways in which a bidding process could violate PURPA. As noted by the Oregon Commission, the bidding process cannot be the only option for QFs to sell energy and capacity. Also, allowing the utility to choose which types of resources QFs or others could bid into the solicitation would be problematic. One of the primary reasons Congress passed the Sagebrush Comments, MAR Notice No. 38-5-214

mandatory purchase provisions of Section 210 of PURPA was that Congress felt “traditional electricity utilities were reluctant to purchase power from, and sell power to, the nontraditional facilities” and that this reluctance “impeded the development of nontraditional generating facilities.” *Mississippi*, 465 U.S. at 750. If a utility could exclude certain QF resource types from the bidding process, such as wind, the utility could effectively terminate its mandatory purchase obligation for those QF resource types. That would obviously violate PURPA, and utilities should have no discretion as to which resource types can bid into the solicitation. Because a bidding process is fraught with potential PURPA violations, the MPSC should not lower the eligibility cap to 2 MW or require a bidding process as the only option for all Montana QFs over the published rate size limit.

Respectfully submitted this 25<sup>th</sup> day of November.

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